Ng Cheah Cheong v Ong Sing Hock

HIGH COURT (TAIPING) — CIVIL APPEAL NO 12–11 OF 2001
VT SINGHAM J
15 JULY 2002

Civil Procedure *— Appeal — Notice of — Whether copy of notice of appeal served must be endorsed by the court — Subordinate Courts Rules 1980 O 49 r2(6)*

This is an appeal against the decision of the Sessions Court, Taiping that dismissed the appellant's claim for damages for injuries arising out of a road accident that occurred on 2 November 1993 involving his motorcycle and a motorcycle that was ridden by the respondent. The appeal was against liability and quantum. The appellant in this case was the plaintiff, aged 23 years, a restaurant worker. He had filed an action at the Sessions Court, Taiping for general and special damages against the respondent. At the outset of the appeal that came up for hearing, the respondent raised a point of law as a preliminary objection that the appeal was not properly brought before this court. It was contended that the notice of appeal which was served on the respondent's solicitor was defective as the copy which was served was not endorsed by the court, in this case by the Sessions Court, Taiping, before it was served as required under O 49 r 2(6) of the Subordinate Courts Rules 1980 ('the SCR').

Held, allowing the appeal:

(1) The whole purpose of serving a copy of the notice of appeal on the opponent or the respondent or on all parties directly affected by the appeal within the time frame limited to file an appeal under the rules is to give early notice to the parties that the appellant is dissatisfied with the decision of the court and that he wishes to appeal to the High Court. By this early notice, there will be no room for surprises, delays and prejudice caused to any party directly affected by the appeal. The legislature and the Rules Committee have, in their own wisdom, not required an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors and that it only required service of the notice of appeal, and that it be served within the time limited to file the appeal, being within 14 days from the date on which the decision was pronounced by the lower court (see p 488D–F).

(2) In the face of this express provision in O 49 r 2(6) of the SCR which is crystal clear, so plain and unambiguous, there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted it would surely be an usurpation of the legislative function and an extension to the Parliamentary language, and this court would then be encroaching into the domain of the legislature and importing words into the rules of the court which have in fact statutory force. This court is reminded

that the function of this court is 'interpretation, not legislation'. Consequently, it is not the function of this court to include words to the rules of the court (see pp 488F–H, 489F); *Himat Iktisas (M) Sdn Bhd v Better Sleep Marketing (East Coast) Sdn Bhd* [2002] 1 MLJ 577 not followed.

(3) As for liability, the learned sessions court judge had erred in law and in fact in dismissing the plaintiff's claim where he said that there were no police photographs tendered to support the appellant's claim as to how the accident occurred. This was a clear case with respect of the inattentiveness by the learned sessions court judge because the notes of evidence contained in the record of appeal showed that the police photographs were tendered. If the sessions court judge had taken this evidence, being the photographs, into consideration and directed his mind judiciously, he would not have fallen into this grave error where he said in his grounds of judgment that 'there are no photographs in respect of this investigation'. In the circumstances, the court had no alternative but to intervene in the appeal and apportion liability on a 50:50 basis on the facts and circumstances in the instant appeal (see pp 505H–506A).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Mahkamah Sesyen, Taiping yang telah menolak tuntutan perayu untuk ganti rugi bagi kecederaan akibat daripada suatu kemalangan jalanraya yang berlaku pada 2 November 1993 di antara motosikal beliau dan sebuah motosikal yang ditunggang oleh responden. Rayuan ini adalah terhadap liabiliti dan kuantum. Perayu di dalam kes ini adalah plaintif, yang berumur 23 tahun, seorang pekerja restoran. Beliau telah memfailkan suatu tindakan di Mahkamah Sesyen, Taiping untuk ganti rugi am dan ganti rugi khas terhadap responden. Pada permulaan rayuan tersebut, responden telah membangkitkan satu bantahan awal bahawa rayuan tersebut tidak dikemukakan di hadapan mahkamah ini dengan betul. Ia telah ditegaskan bahawa notis rayuan yang disampaikan ke atas peguamcara responden adalah cacat memandangkan salinan yang disampaikan tidak diindorskan oleh mahkamah, di dalam kes ini, Mahkamah Sesyen, Taiping seperti yang diperuntukkan di bawah A 49 k 2(6) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR').

Diputuskan, membenarkan rayuan tersebut:

(1) Tujuan menyampaikan sesalinan notis rayuan ke atas pihak bertentangan atau ke atas responden atau ke atas kesemua pihak-pihak yang dipengaruhi oleh rayuan mengikut jangka masa yang ditetapkan untuk memfailkan rayuan di bawah kaedah-kaedah tersebut adalah untuk memberi notis awal kepada parti-parti bahawa perayu tidak berpuas hati dengan keputusan mahkamah

dan bahawa beliau berniat untuk merayu kepada Mahkamah Tinggi. Melalui notis awal ini, tiada ruang untuk sebarang kejutan, kelewatan dan prejudis ke atas mana-mana parti yang dipengaruhi oleh rayuan tersebut. Badan perundangan dan Jawatankuasa Kaedah-Kaedah tidak, di dalam kearifan mereka, memperuntukkan supaya sesalinan notis rayuan yang telah diindors oleh mahkamah disampaikan ke atas peguamcara, dan hanya memperuntukkan supaya notis rayuan tersebut disampaikan, dan penyampaian hendaklah dibuat di dalam jangka masa yang ditetapkan untuk memfailkan rayuan tersebut, iaitu 14 hari daripada tarikh keputusan tersebut diberikan oleh mahkamah rendah (lihat ms 488D–F).

(2) Pada permukaan peruntukan di dalam A 49 k 2(6) KMR yang jelas, tiada peruntukkan supaya sesalinan notis rayuan yang telah diindorskan oleh mahkamah disampaikan ke atas peguamcara responden. Jikalau ini merupakan suatu peruntukan yang perlu, ia akan merupakan perampasan kuasa fungsi badan perundangan dan penambahan kepada bahasa Parlimen, dan mahkamah ini akan memasuki kawasan kekuasaan badan perundangan dan menambah perkataan-perkataan ke dalam kaedah-kaedah mahkamah yang mempunyai kuasa perundangan. Mahkamah diingatkan bahawa fungsi mahkamah ini adalah 'interpretation, not legislation'. Berikutan itu, ia bukan fungsi mahkamah untuk menambahkan perkataan-perkataan kepada kaedah-kaedah mahkamah (lihat ms 488F–H, 489F); *Himat Iktisas (M) Sdn Bhd v Better Sleep Marketing (East Coast) Sdn Bhd* [2002] 1 MLJ 577 tidak diikut.

(3) Dalam perkara liabiliti, hakim mahkamah sesyen yang arif terkhilaf di sisi undang-undang dan fakta dalam menolak tuntutan plaintif di mana beliau berkata bahawa tiada gambar foto polis yang dikemukakan bagi menyokong kes perayu untuk menunjukkan bagaimana kemalangan tersebut berlaku. Ini adalah satu kes yang jelas berkaitan dengan ketidakpekaan hakim mahkamah sesyen yang arif kerana nota keterangan di dalam rekod rayuan menunjukkan bahawa gambar foto polis telahpun dikemukakan. Jikalau hakim mahkamah sesyen telah memberi pertimbangan kepada gambar-gambar foto tersebut dan telah mengarahkan minda beliau dengan adil, beliau pasti tidak akan melakukan kesilapan yang serius di mana beliau berkata di dalam alasan penghakimannya bahawa 'there are no photographs in respect of this investigation'. Dalam keadaan tersebut, mahkamah tiada pilihan lain melainkan campur tangan di dalam rayuan dan mengagihkan liabiliti pada dasar 50:50 di atas fakta dan keadaan di dalam rayuan ini (lihat ms 505H–506A).]

Notes

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1028–1094.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Chan Wai Tong & Anor v Li Ping Sum [1985] 2 WLR 396 (refd)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)
Chong Thain Vun v Watson & Anor; Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun [1968] 1 MLJ 65 (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)
Crawford v Spooner (1846) 6 Moore PC 1 (refd)
Dovey and the Metropolitan Bank (of England and Wales), Limited v John Cory [1901] AC 477 (refd)
Doyle v Olby Ironmongers Ltd [1969] 2 QB 158 (refd)
Duport Steels Ltd & Ors v Sirs & Ors [1980] 1 WLR 142 (refd)
Ee Kim Kin v Collector of Land Revenue, Alor Gajah [1967] 2 MLJ 89 (refd)
Fothergill v Monarch Airlines [1980] 3 WLR 209 (refd)
Garland v Carlisle (1837) 7 ER 263 (refd)
Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370 (refd)
Grundt v Great Boulder Proprietary Gold Mines [1948] Ch 145 (refd)
Harkness v Bell's Asbestos And Engineering Ltd [1967] 2 QB 729 (refd)
Helsby, Re; ex p, The Trustee [1894] 1 QB 742 (refd)
Himat Iktisas (M) Sdn Bhd v Better Sleep Marketing (East Coast) Sdn Bhd [2002] 1 MLJ 577 (not folld)
Idris bin Haji Salleh v Federal Auto Holdings Bhd [1979] 2 MLJ 141 (refd)
Imtiaz Ahmad v Ghulam Ali PLD (1963) SC 382 (refd)
Ismail bin Abdul Hamid v OSK & Partners Sdn Bhd [1996] 3 MLJ 686 (refd)
Kanan Subramaniam & Satu Lagi lwn Aman Syah Abadzyuid [2002] 6 CLJ 34 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)
Lee Choo Tai & Anor v Tou Teng Chung [1989] 2 CLJ 384 (refd)
Lee Guat Eng v Tan Lian Kim [1985] 2 MLJ 196 (refd)
Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419 (refd)
Lim Cheng v Sandanam [1962] MLJ 254 (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)
London Transport Executive v Betts [1959] AC 213 (refd)
Magor and St Mellons Rural District Council v Newport Corporation [1951] All ER 839 (refd)
MBf Holdings Bhd v Emtex Corporation Bhd [1986] 1 MLJ 477 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Mirams, Re [1891] 1 QB 594 (refd)
Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30 (refd)
Ogden Industries Pty Ltd v Lucas [1969] 3 WLR 75 (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Reg v Barnet LBC; exp Shah [1983] 2 WLR 16 (refd)
SA Andavan v Registrar of Titles, Negeri Sembilan & Ors [1977] 2 MLJ 220 (refd)
Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295 (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211 (refd)
Sundram v Arujunan & Anor [1994] 3 MLJ 361 (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42 (refd)
Tan Ting Kok v Cheong Lep Keen & Anor [1969] 1 MLJ 153 (refd)
Tan Weng Chiang v PP [1992] 2 MLJ 625 (refd)
The Matter Of An Arbitration Between Coles and Ravenshear [1907] 1 KB 1 (refd)
Wong Lai Fatt v PP [1973] 2 MLJ 31 (refd)
Woon Ngee Yew & Ors v Ng Yoon Thai & Ors [1941] MLJ 37 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 17(1), (4), (5), 28(1),
Rules of the High Court 1980
Rules of the High Court (Amendment) 2002 O 1A, O 2
Subordinate Courts Rules 1950 [repealed]
Subordinate Courts Rules 1980 O 26A, O 49, rr 1, 2, (1), (2), (3), (6)

S Saktivel (*Kula & Assoc*) for the appellant.
Corrine Teh Gaik Suan (*Othman Hashim & Co*) for the respondent.

VT Singham J: This is an appeal against the decision of the Sessions Court, Taiping which had on 17 May 2001 dismissed the appellant's claim for damages for injuries arising out of a road accident which occurred on 2 November 1993 at 2½ milestone, Jalan Simpang, Taiping involving his motorcycle No ACH 9263 and motorcycle No ACK 3525 which was ridden by the respondent. The appeal was against liability and quantum. The appellant in this case was the plaintiff, aged 23 years, a restaurant worker. He had filed an action by a summons dated 12 September 1994 at the Sessions Court, Taiping for general and special damages against the respondent.

Preliminary objection

At the outset of the appeal which came up for hearing on 8 February 2002, the respondent's counsel, Ms Corrine Teh Gaik Suan, raised a point of law as a preliminary objection that the appeal was not properly before this court. This court will deal with that *in limine*. She contended that the notice of appeal dated 18 May 2001 which was served on her firm as solicitors for the respondent is defective as the copy which was served on her firm was not endorsed by the court, in this case by the Sessions Court, Taiping before it was served on them as required under O 49 r 2(6) of the Subordinate

Courts Rules 1980 ('the SCR'). She submitted that the appellant's solicitors must serve a copy of the notice of appeal which was filed in court and returned to the appellant's solicitors by the court with the endorsement by the court of the date of filing and not just any copy of the notice of appeal as was done in this case.

At this stage, it would be convenient to set out the relevant provisions of O 49 rr 1 and 2 of the SCR for this appeal which is as follows:

> 1 In this Order 'decision' includes 'judgment', 'order' and 'decree'.
>
> (1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. *A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.*
>
> 2 (2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.
>
> (3) *The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced.* The Court appealed from shall there upon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.
>
> (4) As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.
>
> (5) Within 14 days from the receipt of the notification, the appellant shall, unless the Court for sufficient cause otherwise orders —
>
> (a) deposit in the Court appealed from a sum which in the opinion of the Registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and
>
> (b) lodge in the Court appealed from a sum of two hundred and fifty ringgit, or such lesser sum as the Court may in any case direct, by way of security for the costs of the appeal.
>
> (6) *The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.* (Emphasis added.)

However, on being questioned by this court as to whether the particular rule in reference to the service of the notice of appeal on the respondent's solicitors provides for such a requirement that only an endorsed copy by the court of the notice of appeal must be served on the respondent's solicitors, the learned counsel for the respondent admirably conceded that the rule does not provide for such a requirement. Nevertheless, she argued that there is a decision of the High Court, Kota Bahru which has ruled that only a copy of the notice of appeal which is endorsed by the lower court could be effectively served on the respondent's solicitors. Based on that decision, she submitted that the appeal should be dismissed with costs. Learned counsel for the respondent referred to *Himat Iktisas (M) Sdn Bhd v Better Sleep*

Marketing (East Coast) Sdn Bhd [2002] 1 MLJ 577 in support of her argument. In that case, the appellant who was the defendant in respect of a summary judgment obtained by the respondent pursuant to O 26A of the SCR appealed to the High Court against the decision of the sessions court. The respondent's counsel in that case however raised a preliminary objection at the High Court that the notice of appeal which was served by the appellant's solicitors on them was defective as the copy of the notice of appeal which was received by the respondent's solicitors was not endorsed by the court and by implication, it was contended that it was never filed in court. His Lordship Suriyadi J in allowing the preliminary objection had dismissed the appeal with costs. His Lordship ruled at pp 582–584 that:

> To reiterate, the reason for my agreeing with the preliminary objection followed by the rejection of the impugned notice of appeal was not because it was served out of time, but on the premise of the failure of the defendant to serve the plaintiff with a good notice of appeal. Even though the plaintiff had been supplied with a copy of the notice of appeal, the fact that it had not emanated from the court, a good notice of appeal could not have been said to have been served (*Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1 MLJ 153). That being so, no service had taken place.
>
> ... the only conclusion is that the 'notice of appeal' to be served by the appellant must be a notice of appeal that had been filed and endorsed with a date of filing by the registrar (O 49 r 2(6) of the SCR read together with r 2(1)).

His Lordship ruled that the notice of appeal which was served on the respondent's solicitors was flawed, hence the appeal was not competent.

For the sake of the importance of the preliminary objection which is concerned with the construction of O 49 r 2(3) and (6) of the SCR, it would be convenient to once again state the particular sub-r of O 49 which is relevant for the preliminary objection in this appeal. Rule 2(3) and (6) of O 49 of the SCR states as follows:

> (3) *The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced.* The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.
>
> (6) *The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors.* It shall not be necessary to serve parties not so affected. (Emphasis added.)

On the other hand, Mr S Saktivel, counsel for the appellant, submitted that there is no requirement under O 49 r 2(6) of the SCR for the appellant to serve an endorsed copy by the court of the notice of appeal. He contended that the rule merely requires that the notice of appeal must be filed in court within 14 days from the date of the decision and that the notice of appeal must be served within the time limited for the filing of the notice of appeal. He contended that the rule did not require an endorsed copy by the court of the notice of appeal to be served on the respondent. Learned counsel for

the appellant submitted that a copy of the notice of appeal as required under O 49 r 2(6) of the SCR has been served on the respondent's solicitors within the 14-day period. He submitted that the preliminary objection ought to be dismissed with costs and that this court should proceed to hear the appeal on the merits. He further submitted that in the instant appeal the appellant has complied with the two requirements as stipulated and in accordance with O 49 r 2(3) and (6) of the SCR, that is, the notice of appeal was filed in court within 14 days from the date on which the decision was delivered and the notice of appeal was served on the respondent's solicitors within the time limited for the filing of the notice of appeal. Accordingly, he submitted that the notice of appeal which was served on the respondent's solicitors was good and sufficient notice and that the purpose of the service of the notice of appeal was purely to give notice to the respondent's solicitors that an appeal has been filed against the decision of the sessions court. He finally submitted that the appeal is properly before this court and urged this court to proceed with the appeal and dismiss the preliminary objection with costs.

Object of serving notice of appeal on respondent

This court is of the view that the whole purpose of serving a copy of the notice of appeal on the opponent or the respondent or on all parties directly affected by the appeal within the time frame limited to file an appeal under the rules is to give early notice to the parties that the appellant is dissatisfied with the decision of the court and that he wishes to appeal to the High Court. By this early notice there will be no room for surprises, delays and prejudice caused to any party directly affected by the appeal. The legislature and the Rules Committee, in their own wisdom, have not required an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors and that it only requires service of the notice of appeal and that it be served within the time limited to file the appeal, being, within 14 days from the date on which the decision was pronounced by the lower court.

This court is of the view that in the face of this express provision in O 49 r 2(6) of the SCR which is crystal clear, so plain and unambiguous, there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted, it would surely be an usurpation of the legislative function and an extension to the Parliamentary language and this court would then be encroaching into the domain of the Legislature and importing words into the rules of the court which have in fact statutory force (see s 17(4) and (5) of the Courts of Judicature Act 1964). This court is reminded that the function of this court is 'interpretation, not legislation'.

Wan Yahya FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 quoted Lord Diplock in *Duport Steels Ltd & Ors v Sirs & Ors* [1986] 1 WLR 142 at p 157 when his Lordship said at p 219:

> ... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was,

A and to giving effect to it. *Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.* In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is
B morally justifiable. Under our constitution, it is Parliament's opinion on these matters that is paramount. (Emphasis added.)

In *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 148, his Lordship Edgar Joseph Jr J said the rules of the court are subsidiary legislation and have statutory force where his Lordship stated:

C I might add, in passing, that I do not consider that there is any substance in the submission that O 92 r 4 of the *Rules of the High Court* is purely a rule of practice. *The Rules of the High Court* were enacted in exercise of the powers conferred by s 70 of the *Courts of Judicature Act 1964*, with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee, and are comprised in PU(A) 50 which is clearly subsidiary legislation within the
D meaning of s 3 of the *Interpretation Act 1967. The Rules in my opinion, therefore, have statutory force* and are not mere rules of practice. In the result, I hold that there is jurisdiction by virtue of inherent powers to grant *Mareva* injunctions in this country. (Emphasis added.)

The Rules Committee which are given the powers pursuant to s 17(1) of the
E Courts of Judicature Act 1964 to provide 'rules of court' in order to regulate and prescribe the practice and procedure, including the method of pleadings and the practice to be followed in the respective courts, in its own wisdom have provided the mode and time frame for filing the notice of appeal and the service thereon on all parties directly affected by the appeal or their respective solicitors and it would be unwise for this court to enlarge
F the rules which is primarily and solely the function of the legislature and the Rules Committee. Consequently, it is not the function of this court to include words to the rules of the court. If the preliminary objection as raised by the respondent's counsel is upheld it would amount to a complete denial of a party's right of appeal to the High Court as provided under O 49 r 2(2) of the SCR and subject to the restriction contained in s 28(1) of the Courts
G of Judicature Act 1964.

As for the interpretation of the rules which have statutory force, his Lordship Mohamed Azmi SCJ in *Tan Weng Chiang v PP* [1992] 2 MLJ 625 at p 630 said:

H Where the meaning of words in the statute is plain and unambiguous, judges should not invent fancy ambiguities (see *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142).

His Lordship Seah SCJ in his dissenting judgment in *MBf Holdings Bhd v Emtex Corporation Bhd* [1986] 1 MLJ 477 at p 485 said:

I It is a well recognized canon of construction that a court has no power to fill any gaps disclosed in the Act. To do so would be to usurp the function of the legislature.

In *Dovey and the Metropolitan Bank (of England and Wales), Limited v John Cory* [1901] AC 477 at p 488, Lord Macnaghten said: A

> ... I do not think it *desirable for any tribunal to do that which Parliament has abstained from doing* — that is, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and speaking for myself, I rather doubt the wisdom of attempting to do more. (Emphasis added.) B

Lord Diplock in *Duport Steels Ltd & Ors v Sirs & Ors* said at p 157:

> It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider too injurious to the public interest. C

In *Fothergill v Monarch Airlines* [1980] 3 WLR 209 at p 221, Lord Diplock said: D

> The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament'; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise E of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to F identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of G all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation. H

Lord Denning in *London Transport Executive v Betts* [1959] AC 213 at p 247 said:

> *The judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so;* see *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, [1951] 2 TLR 935, [1951] All ER 839. No court is entitled to substitute its words of the Act I (see *Goodrich v Paisner* [1957] AC 65 at p 88, [1956] 2 WLR 1053, [1956] 2 All ER 176).

A

> ... the business of the courts is to see what Parliament had said, instead of reading into an Act what ought to have been said (per Lord Coleridge CJ in *R v Mansel Jones* (1889) 23 QBD 29 at p 32.

In *Crawford v Spooner* (1846) 6 Moore PC 1 at p 9:

B

> We cannot aid the legislature's defective phrasing of an Act, *we cannot add and mend, and, by construction, make up deficiencies which are left there.* (Emphasis added.)

In the meantime, this court took the liberty to look at the appeal procedure from the lower court to the High Court provided in the repealed Subordinate Courts Rules 1950 which was the rules of the subordinate C courts prior to the new Subordinate Courts Rules 1980 which came into force on 1 April 1981 for the purpose of comparison with the present SCR. Even under the old rules, there was no requirement to serve an endorsed copy by the court of the notice of appeal on all parties directly affected by the appeal or their respective solicitors. The only additional or new requirement which is included in O 49 r 2(1) of the SCR is for the registrar D of the lower court to send a copy of the notice of appeal with the date filed endorsed thereon to the registrar of the High Court. There is no requirement for the registrar of the lower court to send a copy of the notice of appeal to the appellant's solicitors with the date filed endorsed on the notice of appeal.

E Even assuming for the purpose of argument that there is such a requirement for the appellant to serve an endorsed copy of the notice of appeal on the respondent's solicitors and within the 14 day period under r 2(6), it still cannot possibly be complied as the lower court in the instant appeal has not returned an endorsed copy of the notice of appeal to the appellant's solicitors. In this respect, counsel for the appellant said from the F bar table that the lower court did not return a copy of the notice of appeal which was filed at the Sessions Court, Taiping with the endorsement of the date of filing and signed by the registrar. In response, learned counsel for the respondent was candid when she said that she could not confirm if a copy of the notice of appeal with the endorsement was indeed returned by the sessions court to the appellant's solicitors.

G

Nevertheless, learned counsel for the respondent contended that in such a situation where a copy of the notice of appeal is not returned by the court to the appellant's solicitors, the appellant could formally apply for an extension of time to serve an endorsed copy of the notice of appeal on the respondent's solicitors outside the 14-day period after it is received by the H appellant's solicitors from the court. This court is unable to appreciate this argument because, firstly, there is no express requirement in the rules at all for the lower court to return an endorsed copy of the notice of appeal to the appellant's solicitors and secondly, the requirement provided in O 49 r 2(1) of the SCR is for the registrar of the lower court to send a copy of the notice of appeal with the date filed and endorsed thereon to the registrar of the I High Court. If at all there was such an obligation on the part of the registrar of the lower court to send a copy of the notice of appeal with the date of filing endorsed in the notice of appeal to the appellant's solicitors, it would

have been expressly included in the rules. Similarly, the obligation on the part of the appellant or his solicitors to serve a copy of the notice of appeal with the date of filing endorsed by the registrar of the lower court as contended by counsel for the respondent would have also been expressly included in the rules, but none of these two requirements, namely, for the registrar of the lower court to send a copy of the notice of appeal with the date of filing endorsed on the notice of appeal to the appellant's solicitors, and for the appellant's solicitors to serve a copy of the notice of appeal with the date of filing endorsed by the registrar of the lower court on the respondent or his solicitors exist. Further, it will not be the fault of the appellant or his solicitors if the endorsed copy of the notice of appeal had not been returned by the registry of the lower court to the appellant's solicitors within a reasonable time and within the 14 days so as to enable the appellant's solicitors to serve on the respondent's solicitors within the 14-day period. In any event, why should the appellant or his solicitors be placed with this burden or predicament when they have complied with the express requirement in O 49 r 2(6) of the SCR. Indeed, interpretation of the rules of the court should be made clear and be consistent so that parties, litigants and lawyers who come to court may act with certainty and lawyers will be able to advise their clients accordingly and not be in a state of indecision of any legal uncertainty.

In *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42, Abdul Hamid Omar LP observed at p 44 in construing statutory provision that:

> To hold otherwise would mean that the court is creating law to provide for something which clearly the legislature has no intention to do. We feel that our legislature has enacted exhaustively and exclusively.

In *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at p 352, his Lordship Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court comprising a panel of five judges presided by the Chief Justice of Malaysia said:

> It is right to say at the risk of being trite, that in interpreting a statute, what the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In *Cheatley v R* (1972) 127 CLR 291, Barwick CJ said at p 296: 'In construing the section we are seeking Parliament's intention'. Similarly, in *Attorney-General (Canada) v Hallet & Carey Ltd* [1952] AC 427, Lord Radcliffe said at p 499: '... every statute is to be expounded according to its manifest or expressed intention'.

It is important to observe that practical difficulties may arise as a consequence if there is insistence for an appellant to serve an endorsed copy of the notice of appeal on the respondent. Assuming that, and if the notice of appeal is filed on the 14th day after the decision of the lower court is delivered, which the appellant is legally entitled to, how is the appellant to serve the endorsed copy by the court on the respondent within the 14 day period limited to file the notice of appeal, as the court may not be able to return within the said time frame a copy of the notice of appeal with the endorsement of the date of filing to a solicitor who is in a distant town or state so as to enable the appellant's solicitors to serve the endorsed copy of

A the notice of appeal on the respondent. On the other hand, what is the position if the notice of appeal is filed on the date of the decision or even the next day and the court does not return a copy of the notice of appeal with the date of filing endorsed on the notice of appeal to the appellant's solicitors very much before the 14-day period so as to enable the appellant's solicitors to effect service of the notice of appeal with the endorsement by
B the court on the respondent or his solicitors.

Generally speaking, some lower courts have never returned and do not return to the appellant's solicitors a copy of the notice of appeal which has been filed in court with the endorsement of the date of filing either within the 14 days or even after the said period probably because the rules do not
C require the lower court to return the same to the appellant's solicitors. In those circumstances, how does one expect the appellant to serve an endorsed copy of the notice of appeal by the court on the respondent and within the time frame of 14 days? Does not the contention of the learned counsel for the respondent lead to absurdities and is contrary to settled practice which has existed in our courts since the SCR came into force on 1 April 1981 that
D service of a copy of the notice of appeal on the respondent would suffice?

In this connection, it is the view of this court that until and unless the rules require expressly an endorsed copy by the court of the notice of appeal to be served on the respondent or his solicitors after having envisaged all these practical problems, this court should not ordinarily interfere with
E parliamentary language except perhaps in cases where it is demanded in the interests of public justice and that must be exercised rarely. In fact, by asking the appellant's solicitors to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors, will it not give rise to an absurd and unjust situation and result in uncertainty in the administration of justice? This court is of the view that to interpret the rules otherwise
F would be to place an unnecessary burden on the appellant who would be at the mercy of the respondent and the court so as to seek an extension of time to serve an endorsed copy by the court of the notice of appeal on the respondent where the rule itself does not provide for such a requirement.

In *Magor and St Mellons Rural District Council v Newport Corporation*
G [1951] All ER 839 at p 841, Lord Simonds observed:

> The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited ...

Lord Morton of Henryton in *Magor and St Mellons Rural District Council* at
H p 847 observed:

> ... it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.

Where the language is explicit, its consequences are for Parliament and not
I for the courts, to consider. In such a case, the suffering citizen must appeal for relief to the law giver and not to the lawyer (per Coleridge J in *Garland v Carlisle* (1837) 7 ER 263 at p 268).

In *Grundt v Great Boulder Proprietary Gold Mines* [1948] Ch 145 at pp 159–160, Lord Greene MR said: A

> ... although the absurdity or the non-absurdity of one conclusion as compared with another may be of assistance, and very often is of assistance, to the court in choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with great care, remembering that judges may be fallible in this question of an absurdity, and in any event must not be applied so as to result in twisting language into a meaning which it cannot bear; it is a doctrine which must not be relied upon and must not be used to rewrite the language in a way different from that which it was originally framed. B

Therefore, if this court were to readily accept the contention of the learned counsel for the respondent, would it then not be asking this court to imply or import into O 49 r 2(6) of the SCR, a further condition which the legislature or the Rules Committee did not do so. It is quite appropriate to state at this stage that in judicial law-making, the courts should not usurp the function of the legislature or even for that matter the function of the Rules Committee which is chaired by the Rt Honourable Chief Justice of Malaysia as it might provoke the independent 'relationship between the legislature and the judiciary in the law-making process'. Further, the suggested new rule as contended by the respondent's counsel would have, either or by implication, to contradict the existing rule on the service of the notice of appeal. If the existing rule is to be changed to suit the argument of the respondent's counsel, it would again be a matter for Parliament and the Rules Committee. C D E

In *Reg v Barnet LBC; exp Shah* [1983] 2 WLR 16 at p 30, Lord Scarman observed:

> The way in which they used policy was, in my judgment, an impermissible approach to the interpretation of statutory language. Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. But that is not this case. F

In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188, his Lordship Raja Azlan Shah FJ (as his Highness then was) observed: G

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at p 118: H
>
> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. *But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the* I

A *language of the Act in accordance with the settled rules of construction.* It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the legislature.' (Emphasis added.)

It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be B criticised by writers of such great distinction' — per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702 at p 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

C In *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419, which is referred to in *Himat Iktisas (M) Sdn Bhd*, the Supreme Court, with respect, did not state that a copy of the notice of appeal which is required to be served on the respondent has to be an endorsed copy by the court showing the date on which it was filed in court. His Lordship Harun Hashim SCJ in that case had merely stated that the correct procedure to be followed in respect of D appeals to the High Court is that firstly, the appellant must file the notice of appeal in the court appealed from within 14 days from date of decision and secondly, the appellant must serve a copy of the notice of appeal showing the date on which it was filed in court on the respondent or his solicitors which should also be done within 14 days from the date of the decision which is the time period permitted to file the notice of appeal in the registry E of the subordinate court. Following the observation of his Lordship Harun Hashim SCJ, it is expressly clear that there is no requirement for the appellant to serve an endorsed copy by the court showing the date on which it was filed in court and that decision does not lend support to the contention of the respondent's counsel that only an endorsed copy by the court must be served on the respondent's solicitors for the appeal to be F properly brought before this court.

In any event, this court is of the respectful view, and without speculating on the rationale behind the observation by the Supreme Court in *Lee Lan*, ie for the appellant to state on the copy of the notice of appeal which is intended to be served on the respondent's solicitors showing the G date on which it was filed in court, must have been merely to notify the respondent's solicitors that the notice of appeal has in fact been filed in court within the 14-day period from the date on which the decision was pronounced. This, no doubt, is good practice so as to put the respondent on notice that the notice of appeal has been filed within the time limited for filing of the appeal and the appeal is properly before the High Court. On the H other hand, to insist that the notice of appeal, which was served on the respondent's solicitors was defective and that the appeal was not properly before the High Court because the notice of appeal which was served on the respondent's solicitors does not show the date on which it was filed in court is going too far and interfering with the well established practice carried on I for many years by lawyers in this jurisdiction.

However, it is important to observe that in practice the requirement to state on the copy of the notice of appeal which is intended to be served on

the respondent's solicitors who is in a distant town or state showing the date on which it was filed in court is not usually observed because a copy of the notice of appeal is basically served on the respondent's solicitors by a carbon copy of the covering letter of the firm of the appellant's solicitors which is addressed to the registrar/magistrate/sessions court judge where the notice of appeal is enclosed for filing with the necessary filing fees. In such a situation, there is really no necessity to state on the copy of the notice of appeal which is served on the respondent's solicitors showing the date on which it was filed in court as the covering letter which is addressed to the court with a carbon copy of the said letter enclosing a copy of the notice of appeal will show the date and that it is being served on the respondent's solicitors at the time of filing in court so long as it is done within the 14-day period.

On the other hand, this court wishes to stress at this stage that merely sending or posting copies of the notice of appeal for filing with the covering letter of the firm of solicitors of the appellant need not necessarily mean or refer to the date of filing the notice of appeal in court because the filing of the notice of appeal in court will be the date only when the court actually receives the notice of appeal and not on the date when it is posted. The date of posting or the date which is entered in the despatch book of the appellant's solicitors firm cannot be the date of filing in court, as in some cases the notice of appeal is not despatched even to the local courts on the same date it is recorded in the despatch book but on the following day, and according to the convenience or at the leisure of the despatch clerk due to lack of proper supervision or follow up by some solicitors firms.

In the circumstances, this court, with respect, is unable to follow the ruling in *Himat Iktisas (M) Sdn Bhd* that a copy of the notice of appeal which is served on the respondent's solicitors must be an endorsed copy by the court. Further, the cases referred to in *Himat Iktisas (M) Sdn Bhd* in respect of the service of a copy of the notice of appeal, namely, *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370 and *Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1 MLJ 153 are under the repealed rules of the Supreme Court 1957 and the repealed Federal Court (Civil Appeals) Appeals (Transitional) Rules 1963 which requires the notice of appeal to be served on all parties directly affected by the appeal ie 'at the time of filing the notice of appeal' and 'at the same time the notice of appeal is filed in court' respectively and has no relevance to the point of law raised in the instant appeal.

Decision of a court of coordinate jurisdiction

However, it is quite relevant to observe that this court is bound to accept the decisions of the higher courts to be in line with the hierarchical system of courts which exists in this jurisdiction and to be in line with the principle of stare decisis. On the other hand, this court with respect is not bound and has the freedom to depart from a decision of a court of coordinate jurisdiction although 'judicial courtesy' requires that judges do not dissent from the views of their brethren. In *Sundralingam v Ramanathan Chettiar*

A [1967] 2 MLJ 211 at p 213, his Lordship Ong Hock Thye FJ (as he then was) said:

> Each court, of course, is bound by the decisions of courts above it, but *'individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren'*; see *Law in the Making* (6th Ed) p 231. I do not think I can usefully add anything to what Sir Carleton Allen said, except to point out that, within the past decade and even the last lustrum, judges in Malaya have, on several occasions respectfully agreed to differ, as may be seen from the reports in *The Malayan Law Journal*'. (Emphasis added.)

In *Ogden Industries Pty Ltd v Lucas* [1969] 3 WLR 75, Lord Upjohn at p 85 said:

> They desire to reiterate however what has so often been said before that in a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
>
> These general principles are particularly important when questions of construction of statutes are in issue.
>
> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than that found in the words of the Act itself.
>
> No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment. It is with these principles in mind that their Lordships approach this very considerable body of authority.

Since there is no requirement for the appellant or his solicitors to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors, the appellant who has the statutory right to appeal against the decision of the lower court, and subject to s 28(1) of the Courts of Judicature Act 1964, he ought not to be deprived of an advantage granted to him by the rules, 'unless there has been on his part some conduct raising an equity against him ...'. Section 28(1) of the Courts of Judicature Act 1964 reads as follows:

> Civil appeals from subordinate courts
>
> (1) Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where

> the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law.

This court cannot accept that merely failing to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors which in any event is not required by the rules can deprive a litigant, in this case the appellant, of his statutory right of appeal to the High Court. It is the fundamental right granted to an aggrieved party to take his grievance against the decision of the lower court to the High Court by way of an appeal which is basically a continuity of the hearing in the lower court by way of re-hearing an appeal in the High Court and the respondent cannot put hurdles against the appellant by way of trivial and technical objections.

Appeal not to be decided on technical objections

It is the view of this court that the High Court sitting in an appellate capacity should be more concerned with the merits of the case and re-hear the whole case and not simply decide the appeal on trivial and technical objections raised by way of preliminary objection with a view to shut out the appellant. In *R Rama Chandran*, his Lordship Edgar Joseph Jr FCJ at p 191 said:

> Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. *Thus, appellate jurisdiction is concerned with the merits of a case.* (Emphasis added.)

In *Re Helsby; ex p The Trustee* [1894] 1 QB 742, Lord Halsbury said at p 744 'no doubt, as a general rule, if there is a real question to be argued, it is better than it should be argued then the appeal should be disposed off upon a technical objection'.

In *The Matter Of An Arbitration Between Coles and Ravenshear* [1907] 1 KB 1, Collins MR said at p 4:

> Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

In *Lim Cheng v Sandanam* [1962] MLJ 254, the respondent's counsel raised a preliminary objection that the appeal record did not include 'the decision' under the repealed O XXXIX r 3(1)(d) of the Subordinate Courts Rules 1950 and the appeal record was not complete and therefore the appeal record should be dismissed. He further contended that the appeal should be dismissed on another ground, namely, that the decision given by the lower court was not extracted by the appellant. His Lordship Hashim J said that 'this is a matter of procedure and the appeal should not be dismissed for a technical flaw in the procedure'.

In *Imtiaz Ahmad v Ghulam Ali PLD* (1963) SC 382 at p 400, Kaikaus J said:

A ... I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the
B form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

In *Harkness v Bell's Asbestos And Engineering Ltd* [1967] 2 QB 729 at pp 735–736, Lord Denning MR observed that:

C Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.

In *Ee Kim Kin v Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89, his
D Lordship Ismail Khan J (as he then was) said at p 90 'Rules of procedure should be the hand maiden and not the master ...'.

In *Wong Lai Fatt v PP* [1973] 2 MLJ 31 at p 33, his Lordship Ong CJ observed that 'the paramount function and duty of the courts is to see that justice is done in all cases'.

E In *SA Andavan v Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220 at p 225, his Lordship Ajaib Singh J (as he then was) observed:

Litigation is governed by rules of procedure and no side may take undue advantage over another by side-stepping any rule and it is the duty of the court to ensure that the parties engage themselves in a fair contest.

F In *Idris bin Haji Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141 at p 143, his Lordship Syed Agil Barakbah J (as his Lordship then was) said:

The courts in a case ... prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application ... .

G In *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196, his Lordship Hashim A Yeop Sani SCJ (as he then was) said at p 196 that 'the rule should not be used to shut out litigants in every case of non-compliance'.

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at pp 342–343, his Lordship Gopal Sri Ram JCA in
H delivering the judgment of the Federal Court said:

That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. *And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.* (Emphasis
I added.)

In *Ismail bin Abdul Hamid v OSK & Partners Sdn Bhd* [1996] 3 MLJ 686, his Lordship Gopal Sri Ram JCA said at p 689:

> I am conscious of the injustice that may have been visited upon litigants by reason of the difference in judicial opinion in that appeals have been dismissed in limine. The ends of justice will be best served in such cases by the appropriate courts entertaining applications to set aside the earlier dismissal and to have the appeals restored to the list. In cases where the notice of appeal has already been filed erroneously in the High Court, that court should treat the non-observance of the rule as an irregularity and proceed to hear and dispose such appeals on merits in order to ensure that substantial justice is done. I would, in this context, recall to mind that *a rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice*: *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungei Ara Bhd* [1995] 1 MLJ 292 at p 296. (Emphasis added.)

In the recent case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at pp 426 and 429, his Lordship Mohtar bin Abdullah FCJ observed that:

> ... a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law ...
>
> The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the court is seized of jurisdiction over the case. So seized, the Federal Court must decide the case in the interests of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

In fact and for the sake of completion, this court wishes to observe that recently the Rules of the High Court 1980 have also been amended to be cited as the Rules of the High Court (Amendment) 2002 which basically prevents preliminary objections on technicalities or on grounds of non-compliance of the rules unless 'such non-compliance has occasioned a substantial miscarriage of justice'.

The new Order 1A of the Rules of the High Court (Amendment) 2002 states:

> COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.
>
> Amendment to Order 2
>
> PRELIMINARY OBJECTION FOR NON-COMPLIANCE OF RULES NOT ALLOWED (O 2 r 3)
>
> 3 A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

However, this court wishes to make it clear that the Rules of the High Court (Amendment) 2002 was not considered or applied to decide the preliminary

A objection raised by the respondent's counsel in the instant appeal as when the decision to dismiss the preliminary objection was made, the amended rules were not in existence and it came into force only on 16 May 2002.

This court is of the view that the appellant did not breach any of the rules as provided under O 49 rr 1 and 2 of the SCR in so far as the service B of the notice of appeal on the respondent's solicitors as a copy of the notice of appeal which was filed in court was in fact served on the respondent's solicitors. The rule did not require the appellant to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors. Therefore it is not the function of this court to rewrite the rules to suit the arguments of the respondent's counsel or to give any extended meaning to the plain C and unambiguous words in O 49 r 2(3) and (6) of the SCR. It is only appropriate at this stage to state that a lawyer is only under an obligation to comply or observe the Rules as expressly stated in the rules of the court, in the instant appeal, the SCR, and is not under any obligation or answerable for any extended construction of the Rules as this may have 'disastrous consequences'. However, in the event there is a difference of judicial D opinion on the construction of the rule by courts of coordinate jurisdiction, it is the considered view of this court that an appellant should not be made to suffer if a lawyer has not complied with the requirement of the rule so long as there is no prejudice or injustice to the respondent or the parties directly affected by the appeal (see *Doyle v Olby Ironmongers Ltd* [1969] 2 QB 158 at p 166, see *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari* E *bin Abdul Rahman* [1995] 1 MLJ 457 at p 490, see *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223).

In *Chong Thain Vun v Watson & Anor; Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65, his Lordship Lee Hun Hoe J (as he then was) said at p 71:

F

> It would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases. *If there is any defect in the rule and amendment is necessary the remedy lies with the legislature. The court should not assume the function of the legislature by filling in omissions which may be deliberate.* (Emphasis added.)

G

Discretion

This court is of the view that whenever a discretion is given to the court, that discretion should be exercised judicially so that it would produce a just result without causing injustice to the parties before the court by just H dismissing an appeal on mere technicality flaws in the procedure which there is none in the instant appeal. This court is not willing to shut out the appellant whose only permissible challenge against the decision of the lower court is by way of an appeal to the High Court merely on procedural technicalities which do not even exist on the facts in this appeal. This court therefore should not make decisions which are unjust to the litigants as the I function of this court is to remedy an injustice whenever it is brought to its attention and not to result in injustice to litigants. Judicial power and discretion which the legislature and the Rules Committee have provided

must be exercised with utmost care so that it would produce a just result and not injustice to litigants. A

This court is bound by the rules of the court and so are litigants and lawyers who are expected to observe and comply with what the rules require and not what a party requires his or her opponent to comply. Courts do not have the power to change the rules even in cases where there is a need to suit practical inconveniences as that is the sole duty of Parliament or the Rules Committee. If Parliament or the Rules Committee in its wisdom employs a certain language and if the language is crystal clear as in O 49 r 2(6) of the SCR in the instant appeal, it is not the function of this court to create uncertainty and inconsistencies to the whole scheme of the rules. It is the view of this court that sub-r 6 means exactly what it says, that is, an appellant is required to serve a copy of the notice of appeal which he has filed in court and that the service is to be done within the time limited for the filing of the appeal which is 14 days from the day on which the decision was pronounced. There is no requirement for the appellant or his solicitors to serve on the respondent or his solicitors an endorsed copy by the court of the notice of appeal. If Parliament or the Rules Committee had intended that an endorsed copy by the court in the notice of appeal should be served on the respondent or all the parties affected by the appeal, it should be so expressed in the clearest possible language. This court is unable to find any such requirement. Cave J in *Re Mirams* [1891] 1 QB 594 at p 595 observed: '... judges are more to be trusted as interpreters of the law then as expounders of what is called public policy'. B C D E

In *Craies on Statute Law* (6th Ed), p 71 states:

> In other words, the language of Acts of Parliament, and more especially of modern Acts must neither be extended beyond its natural and proper limit in order to supply omissions of defects nor strained to meet the justice of an individual case. F

In conclusion, the crux of the preliminary objection is whether the appellant ought to serve a notice of appeal which is endorsed by the court with the date of filing or just a copy of the notice of appeal filed in court. It is the considered view of this court that O 49 r 2(6) of the SCR does not require the appellant to serve an endorsed copy by the court of the date of filing as a service of the copy of the notice of appeal which is filed in court is good service of the notice of appeal. G

In the circumstances, the preliminary objection raised by the respondent's counsel is dismissed. This court rules that the service of the notice of appeal on the respondent's solicitors was good service and that there was a proper appeal before this court and accordingly directed the appellant's counsel to proceed with the appeal on the merits and the respondent's counsel to submit or reply on the merits. H

However, the respondent's counsel sought an adjournment on the ground that counsel En Mohd Rohan bin Mohd Razi who is in charge of the appeal was on medical leave. The appeal was adjourned and fixed for hearing on 21 March 2002 and finally disposed off on the merits on 3 April 2002. I

Appeal on the merits (quantum)

In respect of quantum, the appellant's counsel complained that the learned sessions court judge did not allow damages for two injuries, namely, 'fracture of olecranon and avulsion fracture of the lateral humeral epicondyle' because he found the two injuries were not included in the first medical report dated 8 January 1994 issued by Hospital Taiping where the plaintiff was first admitted into this hospital on 2 November 1993. The plaintiff was discharged on 8 November 1993 and immediately transferred to Hospital Ipoh on the same day on 8 November 1993 for further management. However, the medical report from Hospital Ipoh dated 19 May 1994 contained the two injuries based on the x-ray. The sessions court judge did not make any award for the two injuries as it was opposed by the respondent's counsel on the ground that it was not related to the accident and was not stated in the first medical report dated 8 January 1993 issued by Hospital Taiping. The learned sessions court judge upheld the submission and made a finding that the plaintiff had failed to prove the two injuries on a balance of probabilities whether the fractures were as a result of this accident.

On examining the evidence both oral and documentary in its totality, this court is of the view that the learned sessions court judge was unduly influenced by the submission of the learned counsel for the respondent and without giving any consideration to the fact that the plaintiff was transferred from Hospital Taiping to Hospital Ipoh by Hospital Taiping on the same day upon his discharge from Hospital Taiping. The doctor who issued the medical report dated 19 May 1994 therefore could not have fabricated the two injuries. Similarly, there was no room for the plaintiff to concoct or self induce the two injuries. The injuries as contained in the medical report issued by Hospital Taiping was basically on diagnosis and without an X-ray examination, whereas the injuries as contained in the medical report issued by Hospital Ipoh was as a result of an X-ray. Had the learned sessions court judge considered these factors without just relying on the bare submission of counsel for the respondent, he would not have fallen into this grave error and deprived the appellant of his entitlement for damages for the injuries he had sustained consequent to the accident (see the majority decision in *Sundram v Arujunan & Anor* [1994] 3 MLJ 361 and *Lee Choo Tai & Anor v Tou Teng Chung* [1989] 2 CLJ 384 which has to be distinguished on the facts in the instant appeal). In the circumstances, the reasonable inference is that the appellant sustained the two injuries as a result of the said accident.

This court is of the view that the appellant had proved on a balance of probabilities the two injuries were as a result of the said accident. This court therefore awards a sum of RM10,000 for the fracture of olecranon injury and a sum of RM12,000 for the avulsion fracture of lateral humeral epicondyle totalling to RM22,000, and after deducting 10% for overlapping, the award for the two injuries was RM19,800.

Special damages

As for special damages being loss of earnings, the learned sessions court judge rejected the claim on the basis that there was no proof. This court is

unable to confirm the decision for dismissing the claim for loss of earnings. Based on the unchallenged evidence of the appellant that he was a 'pembantu restaurant', the learned sessions court judge ought to have made some award for the loss of earnings. There is also unchallenged evidence that the appellant was earning RM700 per month and that he could not work for one year. Nevertheless, since there was no documentary evidence to support the actual amount of earnings, this court has allowed a sum of RM350 per month and his loss for one year as his employment and the period of his disablement was not challenged. The appellant is awarded the sum of RM4,200 towards his claim for loss of earnings.

Loss of future earnings

As for loss of future earnings, there is evidence that the appellant has in fact been earning a sum of RM530 per month after the first year from the date of the accident. Nevertheless, the appellant's counsel submitted that there is a reduction in his earnings at RM200 per month. He submitted that the appellant is entitled to RM200 per month for five years as loss of future earnings.

On the other hand, the respondent's counsel submitted that the appellant had failed to mitigate his losses by not returning to his former employment. He also submitted that the appellant did not plead this claim in the statement of claim and therefore he should not be awarded any loss of future earnings. Learned counsel for the respondent had referred to a specialist report dated 10 February 1995 given by Dr Tai Kim Teng, the Orthopaedic Specialist of the appellant's choice that, inter alia, states that 'he will then be more suited for sedentary work.' He further argued that the appellant could still earn a living and therefore no award should be made for any loss of future earnings as submitted by the appellant's counsel.

Be that as it may, having considered the evidence of the appellant and the specialist report of the appellant by Dr Tai Kim Teng as referred to by the respondent's counsel, this court is of the view that the appellant is not entitled to any loss of future earnings as claimed by the appellant as he was employed and continued to earn a sum of RM530 per month after the period of one year from the date of the accident. The period of five years as claimed by the appellant's counsel for loss of future earnings, if allowed by this court would actually, with respect, condone the greed envisaged by the appellant as if the appellant was entitled as of right for his loss of future earnings for so many fixed number of years. The period of 16 years' multiplier is only the maximum period a claimant is entitled to claim for loss of future earnings and it is entirely at the discretion of the court to determine the number of years the plaintiff is entitled to loss of future earnings. This discretion will be based according to the facts of each individual case and does not come within the trend of the awards in previous cases referred to by the appellant's counsel as each case is decided on its own set of facts and not the general design.

This court wishes to reiterate what has been stated by this court in *Kanan Subramaniam & Satu Lagi lwn Aman Syah Abadzyuid* [2002] 6 CLJ

34 at p 46 that loss of future earnings is a claim under general damages and not special damages, and it need not specifically be pleaded by a plaintiff in order to succeed in this claim. Nevertheless, this court is of the view and wish to reiterate that it would be desirable and practical if details of this claim are pleaded by a claimant to enable the defendant or the opponent to know in advance how much and what the claim of the plaintiff is. Also, the defendant would not be taken by surprise with this claim which will be only made known to him during the evidence in chief of the plaintiff or at a later stage, and this could cause undue delay and difficulty for the defendant's solicitors to advise the insurance company with a view to facilitate an amicable settlement, but of course this award will be subject to the determination of liability (see *Chan Wai Tong & Anor v Li Ping Sum* [1985] 2 WLR 396 at p 397, wherein the Privy Council observed as per the headnotes '... it was good practice, as a general rule, for a claim for loss of future earnings to be specifically pleaded; that although the failure to plead the claim for loss of future earnings did not necessarily bar a plaintiff from recovery ...'). Following this observation, it does not mean that if the appellant did not plead details of his loss of future earnings, he will not be entitled to this claim as submitted by counsel for the respondent (see *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 and *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30).

On the other hand, if the claim and details of loss of future earnings are not pleaded, how will the defendant's counsel be able to challenge effectively the plaintiff during cross-examination, and this is likely to lead to injustice and prevent parties from engaging themselves in a fair contest and no doubt result in undue disadvantage to the defendant where he has to rely on the plaintiff's evidence during evidence in chief which no doubt will be the first time the defendant's counsel will have notice of this claim. In the circumstances, it will be in the interests of justice and better practice if the amount and the period for the alleged loss of future earnings is pleaded specifically so that the defendant will have prior and early notice of how much and what the plaintiff's claim is so as to enable the defendant's solicitors to advise the insurance company of any possible settlement out of court.

Liability

Appellate court to interfere if lower court has misdirected on the evidence

As for liability, the learned sessions court judge had erred in law and in fact in dismissing the plaintiff's claim where he said that there were no police photographs tendered to support the appellant's claim as to how the accident occurred. This is a clear case with respect of inattentiveness by the learned sessions court judge because the notes of evidence contained in the record of appeal showed that the police photographs were tendered through PW3 Sgt Abdullah bin Mohd Yusuf, the Investigating Officer and marked as exh P3A-J which the learned sessions court judge had discarded when he dismissed the appellant's claim. This court is of the view that if the sessions

court judge had taken this evidence, being the photographs, into consideration and directed his mind judiciously, he would not have fallen into this grave error where he said in his grounds of judgment that 'there are no photographs in respect of this investigation'. In the circumstances, this court has no alternative but to intervene in this appeal and apportion liability on a 50:50 basis on the facts and circumstances in the instant appeal (see *Woon Ngee Yew & Ors v Ng Yoon Thai & Ors* [1941] MLJ 37 at p 43 where his Lordship McElwaine, CJ (Sabah and Sarawak) by the majority judgment of the Court of Appeal said:

> An appellate court should be very loath to differ on a finding of fact by a court which has seen and heard the witnesses but *if the learned judge can be shewn to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference, it may be the duty of an appellate court to interfere.* (Emphasis added.)

Accordingly, the appeal by the plaintiff against liability is allowed with costs, the finding of the learned sessions court which dismissed the plaintiff's claim with costs is set aside. Liability is apportioned equally between the appellant and the respondent on 50:50 basis. As to the appeal against quantum, the general damages is varied and the award is increased to include the award of RM19,800 for the two injuries. As to special damages, a sum of RM4,200 is awarded at RM350 per month for one year as loss of earnings. There is no award for loss of future earnings. Costs is agreed at RM2,500 for the appeal to be paid to the appellant's solicitors. The deposit paid is ordered to be returned to the appellant's solicitors.

Appeal allowed.

Reported by Peter Ling